Supreme Court, U.S.
FILED
FEB 2 5 2000
CLERK

(4)

No. 99-1038

IN THE

Supreme Court of the United States

EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

RONALD E. MEISBURG
HEENAN, ALTHEN & ROLES
1110 Vermont Ave., N.W.
Suite 400
Washington, D.C. 20005
(202) 887-0800

ANNA M. DAILEY
DONNA C. KELLY
HEENAN, ALTHEN & ROLES
1380 One Valley Square
P.O. Box 2549
Charleston, WV 25329
(304) 342-8960

JOHN G. ROBERTS, JR.*
DAVID G. LEITCH
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

* Counsel of Record

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONER

INTRODUCTION *

The Union devotes the bulk of its Brief in Opposition ("Opp.") to an extended discussion of settled principles of labor arbitration law that are not in dispute. *See* Opp. 5-13. The Union's reluctance to address the issues that *are* in dispute—and which sharply divide the courts of appeals—is understandable, for it has little to offer this Court in its effort to avoid review of the recurring and important issues presented. The Union vainly attempts to dismiss the differing outcomes reached by the courts of appeals in indistinguishable cases as a "tolerable" conflict on the first question presented, and all but ignores the second question presented—on which this Court

* Petitioner's Rule 29.6 statement appears at Pet. ii.

granted certiorari in *United Paperworkers International Union* v. *Misco, Inc.*, 484 U.S. 29 (1987). Try as it might, however, the Union simply cannot avoid the fact that the circuits are in deep conflict on both questions presented, that the conflicts will persist until they are resolved by this Court, and that the practical effect of the conflicts is to sow intolerable uncertainty and generate divergent results in an important area of labor relations law—all at the expense of the compelling public policy that jobs in which safety is a prime consideration not be placed in the hands of those who abuse illegal drugs.

ARGUMENT

1. While attempting to dismiss the deep circuit conflict, even the Union cannot bring itself to dispute that the courts below "disagreed" with the First Circuit's position in *Exxon Corp.* v. *Esso Workers' Union*, 118 F.3d 841 (1st Cir. 1997), Opp. 3, that the decisions in the circuits present a "variance in outcome," *id.* 4, that there is a "divergence of approach among the courts of appeals," *id.* at 15, and that this leads to a "divergence of conclusions" on the question whether reinstatement of those who test positive for drug use to safety sensitive positions violates public policy. *Id.* at 16. The Union's own words thus demonstrate that this case is a prime candidate for review by this Court. *See* S. Ct. Rule 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) ("principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

The Union contends that we have "overamplifie[d]" the split in the courts of appeals. Opp. 15. Not so. While all the circuits recognize the important public interest in avoiding illegal drug use by those in safety sensitive positions, only some find that this interest makes reinstate-

ment of those who test positive for such drug use contrary to public policy and therefore a ground for voiding an arbitration award. Thus, it is the confirmed view of five circuits that, in the words of the First Circuit in *Esso Workers' Union*, "[i]t makes no sense to construe public policy as encouraging—and in some cases mandating—employers to establish and enforce drug testing programs, yet to preclude them from taking decisive action against those employees who test positive." 118 F.3d at 850.[1] Five circuits disagree.[2] As a result, an arbitration award directing reinstatement to a safety sensitive position of an employee discharged because he tested positive for drug abuse may be vacated in Boston, Philadelphia, Houston, St. Louis, and Atlanta, but must be enforced in New York, Detroit, Los Angeles, Denver, and Baltimore—even if the affected employees work for the same company pursuant to the same collective bargaining agreement.[3] Such an entrenched conflict with such

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[1] *See, e.g., Exxon Shipping Co.* v. *Exxon Seamen's Union*, 993 F.2d 357 (3d Cir. 1993); *Gulf Coast Indus. Workers Union* v. *Exxon Corp.*, 991 F.2d 244 (5th Cir.), *cert. denied*, 510 U.S. 965 (1993); *Union Pacific R.R.* v. *United Transp. Union*, 3 F.3d 255 (8th Cir. 1993), *cert. denied*, 510 U.S. 1072 (1994); *Delta Air Lines, Inc.* v. *Air Line Pilots Ass'n Int'l*, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).

[2] *See, e.g., Kennecott Utah Copper Corp.* v. *Becker*, 195 F.3d 1201 (10th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3496 (U.S. Jan. 27, 2000) (No. 99-1268); *United Transp. Union* v. *Union Pacific R.R. Co.*, 116 F.3d 430 (9th Cir. 1997); *Local 97, IBEW* v. *Niagara Mohawk Power Corp.*, 196 F.3d 117 (2d Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3355 (U.S. Nov. 16, 1999) (No. 99-845); *Tennessee Valley Auth.* v. *Tennessee Valley Trades & Labor Council*, 184 F.3d 510 (6th Cir. 1999).

[3] The Court need not infer the conflict from the results or reasoning of circuit court decisions; the courts themselves have expressly recognized the split of opinion. *See, e.g., Association of Flight Attendants, AFL-CIO* v. *Aloha Airlines, Inc.*, No. 96-15088 *et al.*, 1997 WL 257467, at *3 (9th Cir. May 14, 1997) (declining

tangible consequences is intolerable, and should be resolved by this Court.

2. In addition to downplaying the conflict on the first question presented, the Union has no response to the other compelling reasons for this Court to grant review in this case. The Union does not account for the fact that this case involves a repeat offender, and that the public policy against reinstatement of those who have tested positive for drugs is even stronger where an employee has already been given a second chance. The Union ignores the fact that state appellate courts—which look to federal cases for guidance on the question—are also in conflict over the public policy question at issue here. *See* Pet. 14-15 n.3; *see also Southwest Ohio Reg. Transp. Auth.* v. *Amalgamated Transit Union, Local 627*, No. C-980974, 1999 WL 1127293 (Ohio Ct. App. Dec. 10, 1999) (reinstating bus repairman who tested positive for marijuana would violate public policy). Nor does the Union respond to our demonstration that commentators have recognized continuing confusion over the public policy exception requiring this Court's guidance. *See* Pet. 15 n.4.[4] Finally, the Union also ignores the fact that the

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invitation to "revisit our circuit's approach to the public policy exception, and to adopt the approach of other circuits by looking at whether the underlying conduct of the employees violates public policy") (citing *Gulf Coast, supra*, and *Delta Air Lines, supra*); *Esso Workers' Union, Inc.*, 118 F.3d at 850; *Exxon Shipping Co.*, 993 F.2d at 362-364; *Interstate Brands Corp.* v. *Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135*, 909 F.2d 885, 894 n.11 (6th Cir. 1990) (noting "schism" among the circuits); *see also Westvaco Corp.* v. *United Paperworkers Int'l Union, AFL-CIO*, 171 F.3d 971, 977 (4th Cir. 1999) (recognizing conflict over reinstatement of employees who violate sexual harassment policies).

[4] *See also* Andrew M. Campbell, Annotation, *Vacating on Public Policy Grounds Arbitration Awards Reinstating Discharged Employees*, 142 A.L.R. Fed. 387, 405 (1997) (noting that some courts have "refused to vacate arbitration awards reinstating employees

confusion is not limited to the particular context at issue here, but extends to cases involving violations of safety procedures and sexual harassment. *See* Pet. 15-17 & nn. 5, 6.

Instead of confronting the breadth of the problem, the Union is content to suggest that review is not appropriate because there have been "only" 35 court of appeals decisions since *Misco* involving reinstatement of employees who test positive for drug use. Opp. 17 & Appendix. Such a recurring need for the courts of appeals to review the issue suggests not, as the Union would have it, that the issue is rare and unimportant, but rather that it will continue to arise—as indeed it has even in the brief period since the petition was filed [5]—and that the split will persist, unless this Court grants review to resolve the conflict.

Indeed, the need for this Court's review is highlighted by the fact that there are three petitions—from three different circuits—currently on the Court's docket which involve the public policy question. In addition to the petition in this case, petitions have been filed seeking the Court's review of the Second Circuit's decision in *Niagara Mohawk Power Corp.*, *see* 68 U.S.L.W. 3355 (U.S. Nov. 16, 1999) (No. 99-845), and of the Tenth Circuit's decision in *Kennecott Utah Copper Corp.*, *see* 68 U.S.L.W. 3496 (U.S. Jan. 27, 2000) (No. 99-1268). In response to all this, the Union presents only the hope that employers, employees, the courts, and the public can con-

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who have been intoxicated or under the influence of drugs who were in the same occupations as employees whose reinstatement has been vacated" by other courts).

[5] *See, e.g.*, *Eaton Corp.* v. *Paper, Allied-Industrial, Chem. & Energy Workers Int'l Union*, —— F. Supp. 2d ——, 1999 WL 1271867 (N.D. Ohio Dec. 17, 1999); *Dyno Nobel, Inc.* v. *United Steel Workers of America*, 77 F. Supp. 2d 307 (N.D.N.Y. 1999).

tinue to "tolerate" the confusion and conflict on the question presented. That hope is ill-founded; as the *amicus* brief filed by the Institute for a Drug-Free Workplace in support of the petition makes clear, there is a critical need for resolution of the question presented. The issue is ripe for resolution and should be decided by this Court.

3. The Union does not dispute that there is an entrenched circuit conflict on the second question presented —whether an arbitration award may be vacated on public policy grounds only when the award itself violates some positive law or requires unlawful conduct by the employer. Nor could it. This Court recognized the circuit conflict on that question in *Misco*, 484 U.S. at 45 n.12, and—as we demonstrated in the petition—the conflict has only deepened after *Misco* failed to resolve it. *See* Pet. 24-30.

The Union's sole response to the second question presented is *one sentence* asserting that the courts below did not take a position on that question. Opp. 3. The Union is wrong. The district court expressly found that there was no public policy that warranted vacating the arbitrator's reinstatement award because "the DOT Regulations do not *require* that employees who test positive for drug use be automatically discharged." Pet. App. 20a-21a (emphasis added). The district court held that the public policy exception to enforcement of arbitration awards could not be invoked "[b]ecause the DOT Regulations do not make it *illegal* to reinstate employees who test positive for drug use." *Id.* at 21a (emphasis added). As the court concluded: "Consequently, the public policy exception does not apply inasmuch as the arbitrator's award is consistent with the DOT Regulations." *Id.*

In reaching this conclusion, the court quoted the Ninth Circuit's decision in *United Food & Commercial Workers*

International Union, Local 588 v. *Foster Poultry Farms*, 74 F.3d 169 (9th Cir. 1996). *See* Pet. App. 21a. As we explained in the petition, Pet. 27-28, the Ninth Circuit in that case reaffirmed its pre-*Misco* position—what this Court called the "narrower view" among the conflicting circuit positions, 484 U.S. at 35 n.7—that the public policy exception to enforcement of arbitral awards cannot be invoked unless the award itself would violate the law.

The Fourth Circuit below confirmed this position in adopting the district court's reasoning as its own. Pet. App. 4a. That simply reaffirmed the position the court of appeals had adopted in *Westvaco Corp.* v. *United Paperworkers International Union*, 171 F.3d 971 (4th Cir. 1999), where it declined to vacate an arbitration award reinstating a repeat sexual harasser because it could find no law specifically barring such reinstatement. *See* Pet. 16, 28. The courts below have plainly sided with the "narrower view" on the conflict noted by this Court in *Misco*, with the Ninth and D.C. Circuits and against the First, Third, Fifth, Seventh, Eighth, and Eleventh. *See* Pet. 22-28. The Union has offered no reason this Court should not grant certiorari to resolve that conflict.

CONCLUSION

For the foregoing reasons, as well as those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RONALD E. MEISBURG
HEENAN, ALTHEN & ROLES
1110 Vermont Ave., N.W.
Suite 400
Washington, D.C. 20005
(202) 887-0800

ANNA M. DAILEY
DONNA C. KELLY
HEENAN, ALTHEN & ROLES
1380 One Valley Square
P.O. Box 2549
Charleston, WV 25329
(304) 342-8960

JOHN G. ROBERTS, JR.*
DAVID G. LEITCH
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

* Counsel of Record

Counsel for Petitioner